

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-210818.3 & B-213173

**DATE:** April 25, 1984

**MATTER OF:** DSG Corporation

**DIGEST:**

Where a bidder alleges a mistake after bid opening, it is not then generally free to decide to waive its claim. Nevertheless, waiver will be permitted if it is clear that the intended bid would have been the lowest even though the intended bid could not be clearly proven for the purpose of bid correction. However, it is impossible to conclude that alleged mistaken bid would have been the lowest where bidder submitted conflicting claims as to amount of mistake. Therefore, GAO sustains the protest, but the only possible remedy in the circumstances is the granting of bid preparation costs.

DSG Corporation (DSG) protests the Air Force's consideration of a bid submitted by Space Services International (SSI) under invitation for bids No. F65501-83-B-0004 (IFB-0004) issued by Elmendorf Air Force Base, Alaska, for mess attendant services for a base period (date of award through September 1983) and two option periods (all of fiscal years 1984 and 1985). Since DSG's protest, the Air Force issued and awarded two interim contracts pending resolution of the protest. The Air Force also issued invitation for bids No. F65501-83-B-0205 (IFB-0205) for the same services covered by IFB-0004 (including 2 option years). We understand that DSG was afforded an opportunity to bid on IFB-0205 but elected not to. We further understand that the Air Force awarded a contract under IFB-0205 on March 30.

DSG essentially protests IFB-0004 on the grounds that SSI was improperly allowed to waive its mistake claim raised after bid opening and stand on its original bid.

We sustain the protest under IFB-0004. In view of this conclusion, we need not consider DSG's protest under RFP No. F65501-83-R-0025, which resulted in the award of the second interim contract.

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We agree with DSG that SSI was improperly allowed to waive its claim of mistake and stand on its erroneous bid which was lower than DSG's bid. At bid opening, 12 bids were received. SSI was third low with a bid of \$3,683,000. DSG was fourth low with a bid of \$3,986,992.50. The low and second low bidders claimed mistakes in their bids and were allowed to withdraw. SSI, now the apparent low bidder, submitted a mistake in bid claim on March 15, 1983, and requested permission to change its bid from \$3,683,000 to \$4,229,445 because: "It appears that in the computation of our bid, in error the old wage scale was used and the other expenses for G&A, supplies, etc. were completely left off the bid." The request was accompanied by worksheets which were certified by a notary public to be true copies of the originals. Less than 1 month later, on April 5, 1983, SSI submitted a second request to modify its bid which was also accompanied by certified worksheets. On this later date, the particular worksheet which had previously been submitted to establish that SSI's bid had omitted "other expenses for G&A, supplies, etc." in the sum of \$143,000 per year (for the base period and 2 option years) was, itself, omitted. This omission reduced the requested change from \$4,229,445 to \$3,871,944.90--a sum lower than DSG's bid of \$3,986,992.50. SSI did not furnish any explanation as to why it omitted (on April 5) "other expenses" which it had previously claimed on March 15.

Where the mistaken bidder seeks both correction of its mistake and permission to remain in the procurement, the mistake claim must be decided at a higher level than the local purchasing activity. In the case of the Air Force, it must be submitted to the Staff Judge Advocate at Headquarters, Air Force Logistics Command (AFLC), for resolution.

The contracting officer, in forwarding SSI's request to AFLC, advised AFLC that SSI had submitted two separate requests, the first containing a corrected dollar amount higher than the second. It appears, however, that AFLC was only asked to evaluate the second submission, and it is not clear whether the contracting officer furnished AFLC with SSI's first submission. AFLC found clear and convincing evidence of a mistake in SSI's bid; however, AFLC was unable to determine the dollar amount of the bid SSI actually intended to make so as to permit correction of the

bid. Therefore, AFLC advised the contracting officer that SSI would only be allowed to withdraw its bid. When SSI learned of the AFLC determination, it sent a telex to the contracting officer saying: "We hereby accept the contract . . . , based on our original bid price."

It is the Air Force's position that SSI should have been permitted to accept award at its original bid.

We find that the Air Force had a reasonable basis to conclude that, while it was clear that SSI had made an error in its bid, the evidence was insufficient to show the intended bid. Therefore, SSI's claim for correction was properly denied.

Where a bidder alleges a mistake after bid opening, the bidder is not then free to decide to waive its mistake claim. To permit the bidder to do so would be to allow the bidder the impermissible option of either affirming its low bid or withdrawing it, depending upon which appeared to be in its best interest. 52 Comp. Gen. 258 (1972). However, we have permitted an exception to the rule against waiver if it is clear that the "intended" bid would have been the lowest even though the amount of the intended bid could not be clearly proven for the purpose of bid correction. Bruce-Andersen Co., Inc., 61 Comp. Gen. 30 (1981), 81-2 CPD 310.

Although SSI has requested waiver of its mistake claim, there is no way of determining whether its "intended" bid would have been low given SSI's discrepant claim totals of March 15 (which showed a bid higher than DSG's bid) and April 5 (which showed a bid lower than DSG's bid). Since there is no way of resolving the discrepancy, we do not agree with the Air Force's position that SSI should have been allowed to accept award at its original bid. Therefore, DSG, as the next low bidder, was in line for award.

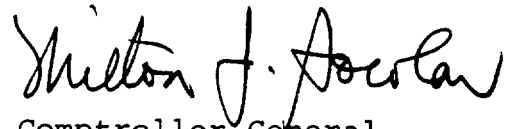
Accordingly, the protest is sustained.

However, as noted above, after two interim contracts were awarded for the services, the Air Force found it necessary to award a contract on March 30, 1984, under IFB-0205 for a base period and two option years. Therefore, it is not possible to recommend award to DSG under the protested

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IFB. Nevertheless, DSG may be paid bid preparation costs upon presentation of a substantiated claim to the Air Force.

  
Comptroller General  
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